

In the Matter of Merchant Mariner's Document No. Z-947900 and all other Seaman Documents
Issued to: ARTHUR EARL PENN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1120

ARTHUR EARL PENN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 14 August 1958, an Examiner of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's seaman documents upon finding him guilty of misconduct. The five specifications found proved allege that while serving as deck maintenanceman on board the United States SS VENTURA under authority of the document above described, Appellant wrongfully failed to perform his duties on or about 24 May, 31 May, 1 July and 24 July 1958; Appellant wrongfully failed to obey a direct order by the Master on 23 July 1958.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by nonprofessional counsel of his own choice. He entered a plea of not guilty to the charge and each specification.

The Investigating Officer made his opening statement and introduced in evidence the testimony of three witnesses - the Master, Chief Mate and Purser of the ship on the dates alleged.

In defense, Appellant offered in evidence the testimony of the Boatswain and able seaman, both members of the crew. Appellant did not testify.

At the conclusion of the open hearing, the oral arguments of the Investigating Officer and appellant's counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner rendered the decision in which he concluded that the charge and five specifications had been proved. An order was entered suspending all documents issued to Appellant, for a period of two months outright and one month on twelve months' probation.

The decision was served on 21 November 1958. A premature notice of appeal was filed by counsel on 27 October 1958 and ratified by Appellant by letter dated 11 July 1959.

FINDINGS OF FACT

Between 20 May and 25 July 1958, Appellant was serving as a deck maintenanceman on board the United States SS VENTURA and acting under authority of his Merchant Mariner's Document No. Z-947900.

On 23 May prior to getting under way from Astoria, Oregon, for Seattle, Washington, the deck crew had been ordered to commence securing the ship for sea at 1800. Appellant did not turn to until 1825.

On 31 May at Seattle, the deck crew had been ordered to commence securing the ship for sea at 1300. Appellant returned on board at 1345 and turned to at 1400.

On 1 July at Wilmington, California, the Chief Mate called Appellant from his room on five occasions to turn to on deck during Appellant's regular working hours from 0800 to 1700.

On July at Newark, New Jersey, the sailing time was posted as 1900. Verbal orders had been issued for the deck crew to secure the ship for sea at 1800. When Appellant was not on deck by 1830, the Master and Chief Mate went to Appellant's room and awakened him. The Master ordered Appellant to turn to. Appellant heard and understood this order but he did not obey it or make any reply to the Master.

On 24 July while en route from Newark to Baltimore, Appellant did not turn to during his regular working hours. The Chief Mate was not able to locate Appellant.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Counsel contends that:

1. Appellant was denied due process since the specifications do not state the place of the alleged offenses as required by the regulations.
2. No entries were made in the Official Logbook concerning the alleged offenses. These incidents were revived by the Master because Appellant refused to sign off by mutual consent.
3. Except for the incident on 1 July, Appellant was not required to work because the times referred to were outside his regular working hours from 0800 to 1700.
4. The Master condoned Appellant's conduct of 1 July and prior dates by signing him on for another voyage on 1 July.
5. Concerning 23 July, there is no proof that Appellant heard the Master's order or was

capable of complying with it.

6. The Examiner erred in his evaluation of the testimony introduced. The Examiner was influenced, in reaching his unjust decision, by the untrue and misleading statements by the Investigating Officer in his summation and rebuttal. These statements pertaining to the incidents on 23 and 24 July were either made deliberately or caused by his lack of experience and knowledge.

In conclusion, it is respectfully requested that the Examiner's decision be reversed and dismissed.

APPEARANCE: Walter H. Sibley, Union representative of Basltimore, Maryland, of Counsel.

OPINION

PART 1.

Although the specifications do not state the place of the offenses alleged as required by 46 CFR 137.05-10(b)(2), there is no indication in the record that this error constituted a denial of due process or resulted in prejudice to Appellant since the location of the ship, on each date in question, was clearly brought out at the hearing. The Examiner should have required this addition to the specifications, in accordance with 46 CFR 137.09-28 (b), when the matter was called to his attention by counsel for the Appellant.

PART 2.

The absence of Official Logbook entries in evidence is not controlling in these proceedings when the allegations are otherwise proved by substantial evidence. The Investigating Officer introduced the best evidence available by obtaining the testimony of the Master and Chief Mate. The Examiner specifically stated that he accepted the testimony of these two witnesses as constituting substantial evidence to prove the specifications.

Not all of the offenses alleged come within the scope of offenses contained in 46 U. S. Code 701 which are required by 46 U. S. Code 702 to be entered in the ship's Official Logbook. In addition, the court decisions, some of which state that prosecution cannot be maintained unless the incident has been properly logged, refer to prosecutions to exact the penalties prescribed in section 701. This administrative, remedial proceeding is an entirely different type of action.

This action was taken by the Coast Guard after the Master complained about Appellant's conduct. The fact that this complaint resulted because Appellant refused to sign off the ship by mutual consent is not material to the proof of the specifications. Any implication that these charges were "trumped-up" against Appellant seems to be refuted by the absence of evidence directly contradicting that presented by the Investigating Officer with respect to the majority of the five

offenses. In The Sharon (D. C. Va., 1931), 52 F.2d 481, it was stated:

"The purpose of the statutes * * * [46 U.S.C. 701, 702] * * * is to protect seamen against arbitrary and unwarranted acts and oppression by the master, not to aid a seaman in taking advantage of his own wrongdoing."

PART 3.

Title 46 U. S. Code 673 states that the crew may be required to work more than eight hours a day when the additional work is necessary for the purpose of safety and when maneuvering, shifting berth, mooring, or unmooring. Appellant's witness, the able seaman who was also the deck union delegate, agreed with the Chief Mate that securing gear and cargo was considered to be "necessary work" (R. 38, 84). Hence, Appellant was required to work overtime securing the ship for sea on 23 May, 31 May and 23 July. The other two specifications refer to incidents during Appellant's regular working hours..

PART 4.

As stated above, this action was instituted by the Coast Guard and not the Master of the ship who complained to the Coast Guard about Appellant's conduct. A Master has no authority to pardon a seaman so far as these proceedings are concerned.

PART 5.

The Examiner accepted the testimony of the Master and Chief Mate that Appellant was awake when he was ordered to turn to by the Master (R. 30, 73) and that Appellant said nothing (R. 53, 67). It is only logical to assume that he heard the order and that he would then have made known any justifiable excuse which he had for not complying with it. Since Appellant did not testify at the hearing, there is no evidence denying that he heard the order or stating any reason why he could not obey it.

PART 6.

The record does not indicate that the Examiner was improperly influenced by the statements of the Investigating Officer in his summation and rebuttal.

With respect to Appellant's failure to turn to on 24 July, the Examiner repeated the Investigation Officer's statement, used in his closing argument, that the deck delegate gave testimony indicating that Appellant was in the messhall until "about 8020" (R. 145) although he should have turned to at 0800. It was reasonable for the Investigating Officer to argue that Appellant was in the messhall at this time in view of the deck delegate's testimony that he went to bed "about 8:30" (R. 100), which time was just after Appellant left the messhall (R. 92) "shortly after 8" (R. 101). It was perfectly permissible for an Investigating Officer to utilize, in his argument, such portions of

conflicting evidence as are most favorable to his cause.

Concerning the Investigating Officer's statement that "all but Penn" turned to on 23 July, counsel contends that the Master testified that three other seamen never turned to on this date. The Master's testimony is that he was told by the Chief Mate that neither Appellant nor his roommate obeyed the Master's order to turn to on deck (R. 67). The Investigating Officer did not influence the Examiner in this matter since he found that Appellant and three other men did not turn to. In any event, this issue is irrelevant to the proof of the specification.

It appears from the record that the statements reflecting on the integrity and capability of the Investigating Officer are unfounded.

CONCLUSION

Since the specifications are supported by substantial evidence, Appellant's request that the Examiner's decision be reversed is denied. The offenses found proved fully justify the order of suspension imposed.

ORDER

The order of the Examiner dated at Baltimore, Maryland, on 14 August 1958, ~~is~~ **AFFIRMED**.

J. A. Hirshfield
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 14th day of October, 1959.